Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

88-112

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DAVID MCDOWELL and DONNA F. MCDOWELL,
Petitioners,

vs.

CREDIT BUREAUS OF SOUTHEAST MISSOURI, INC.,
Respondent.

On Appeal from the Missouri Supreme Court

PETITION FOR WRIT OF CERTIORARI

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OLIVER, OLIVER, WALTZ &
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5-7

QUESTIONS PRESENTED

A.

This Petition for Certiorari presents the issue of whether 15 U.S.C., Section 1681(e), sub(n), sub(o), and sub(t), the Fair Credit Reporting Act, supplanted the law of the State of Missouri as respects the common law tort of defamation, and thereby preempted the state law grant of a First Amendment based "qualified privilege" to a credit reporting agency immunizing credit reporting performed in reckless disregard of the accuracy of the information contained in that report.

B.

Whether or not the Supreme Court of the State of Missouri in affirming the decision of the trial court to deny the giving of Instructions B and/or C extended the protection of the First Amendment of the Constitution of the United States beyond the limits established by this Court in *Dun & Bradstreet v. Greenmoss Builders,* 472 U.S. 749, 86 L.Ed.2d 593, 105 S.Ct. 2939 (1985) and thereby determined, in contravention of this Court's opinion, that the commercial enterprise of credit reporting for hire was entitled to First Amendment protection even though that credit reporting was made in utter disregard of the truth, and resulted in the publication and promulgation of a totally false and fabricated credit report.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Supreme Court of the State of Missouri decided March 15, 1988, in Cause No. 69559 is reported at 747 S.W.2d 630 (Mo. en banc 1988). The decision of the Missouri Supreme Court denying rehearing is not reported, but appears in the Appendix.

JURISDICTIONAL GROUNDS IN THIS COURT

The judgment and decision of the Supreme Court of the State of Missouri was deiivered on March 15, 1988, and the Appellants' (Petitioners here) Motion for Rehearing was denied on April 19, 1988, and copies thereof are appended to this Petition in the Appendix. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The First Amendment to the Constitution of the United States which states in part:

> "Congress shall make no law . . . abridging the freedom of speech . . ."

2. Article VI, Clause 2:

> "This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land; . . ."

3. Portions of the Fair Credit Reporting Act, including Section 1681(e), Section 1681(n), Section 1681(o), and Section 1681(t), the full texts of which are set forth in the Appendix as attached.

STATEMENT OF THE CASE

Prior to March 26, 1982, David McDowell and Donna F. McDowell, Petitioners herein, were a moderately successful business couple owning and operating a construction and cabinet making business in the Jackson-Fruitland area of Cape Girardeau County. By 1982 this substantial business had also been involved in the development of ten residential subdivisions.

Respondent, Credit Bureau of Southeast Missouri, Inc. ("Credit Bureau") is a commercial credit reporting agency. The business of the Credit Bureau involves: (a) providing customers, for a fee, specific credit reports on a particular individual, and (b) publishing a monthly "Credit Bureau Bulletin," a publication listing, among other things, filed bankruptcies. This credit bulletin is distributed throughout the Southeast Missouri trade area to various subscribers.

In April of 1982 the McDowells sold a home in one of their subdivisions to a Gilmore. The sale was conditioned on financing by Colonial Federal Savings and Loan Association of Cape Girardeau, Missouri. In accordance with their usual procedure, among other items, Colonial Federal ordered a "credit report" on the McDowells from Credit Bureau of Southeast Missouri, Inc. Pursuant to this request, Colonial Federal received a "credit report" from the Credit Bureau. This credit report (Exh. 1 and 1-A) and the Credit Bulletin issued for the month encompassing the period March 26, 1982, both contained false and, in fact, fabricated information with respect to the McDowells. This false information stated that the McDowells had filed bankruptcy.

The explanation for the false report is as follows: On March 26, 1982, an employee of the Credit Bureau began to post bankruptcy filings to credit records. On that day that employee, Tina Warff, found a bankruptcy filing for on "Donna R. McDowell, Rt. 2, Box 298, Jackson, Missouri, Seamstress." The McDowells were subsequently mistaken for this Donna R. McDowell. This resulted because the employee: (a) did not compare middle names, (b) did not compare spousal names, (c) did not compare route numbers, (d) did not compare social security numbers, (e) did not compare occupations, (f) did not compare marital status, (g) did not compare sex, and (h) did not compare credit bureau affiliations. Had any one or more of these comparisons been made the employee would have discovered that Donna R. McDowell, Rt. 2, is not Donna F. McDowell, Petitioner herein. Nonetheless, the Credit Bureau:

1. Entered the bankruptcy as a bankruptcy for Donna F. McDowell, and

2. Compounded the error by converting that bankruptcy report to a "joint" report, thereby indicating on the records of the Credit Bureau, in the Credit Report, and in the widely disseminated Credit Bulletin, that both Petitioner, David McDowell, and Petitioner, Donna F. McDowell, had *jointly* filed bankruptcy.

At the time of the employee's failure to make the above comparisons and her unjustifiable conversion of a single into a joint bankruptcy, the Credit Bureau had actual knowledge that David and Donna F. McDowell were members of the Credit Bureau. Additionally, the Credit Bureau had, in fact, been engaged to collect an account against the Donna R. McDowell. As a direct result of this reckless disregard for the truth, and as a further proximate consequence of the Credit Bureau's "invention" of the joint bankruptcy, two results followed:

1. Colonial Federal withheld closing the loan, and

2. Word of the bankruptcy spread through the local trade community, as a result of which business associates refused to do business with the Petitioners for fear of nonpayment.

Nineteen days after the issuance of the fraudulent credit report, and approximately thirteen days after the publication of the Credit Bulletin, following repeated contacts by Colonial Federal which did not believe the report, and by counsel for the McDowells, the Credit Bureau issued a corrected credit report. The Credit Bureau never corrected the erroneous Credit Bulletin.

With the false information in the trade area, the McDowells business began to suffer. Various creditors to whom balances were due immediately filed suit to collect, and the acquisition of credit necessary to the continuation of the business became difficult. The net result was that the McDowells experienced actual damage as computed by Terry Sutton, Ph.D. in the amount of $550,695.02, or as computed by their certified public accountant, $512,291.

After sustaining this loss, Petitioners filed suit in the Circuit Court of Cape Girardeau County seeking recovery. A copy of the Second Amended Petition is appended hereto. At the trial of this cause, Petitioners submitted a "Motion and Request"

the second portion of which was to request appropriate instructions, including Instructions B, C and D. The heart of plaintiffs' claim at trial, as presented by the Instructions and as revealed by the instruction conference (Tr. 981, et seq., attached in Appendix) was the essential claim that the Fair Credit Reporting Act supplanted the preexisting state law with respect to defamation. Particularly, the Petitioners were entitled to submit against Respondent, Credit Bureau, for its violation of Section 1681(e), and recover, under Section 1681(o), their compensatory loss for the negligent noncompliance, and to obtain punitive damages under Section 1681(n) under the standard that the action of the Credit Bureau was so reckless and in utter disregard of the truth as to constitute willful noncompliance. Those claims were presented to the trial court in the Second Amended Petition and magnified by the motion filed during trial, and finally amplidied in the instruction conference (Appendix, Item No. 6) held November 20, 1985.

The trial court's response (Appendix, Item No. 5) during the instruction conference was to deny the tendered instructions and to assert that the Credit Bureau had First Amendment protection requiring the issuance of a "qualified privilege instruction" which would have required the jury to find an actual specific intent to harm Petitioners (Tr. 981). These matters were then presented by Brief and Supplemental Briefs directly to the Missouri Court of Appeals for the Eastern District. In its unreported Opinion, the Court of Appeals ignored the preemption issue, but agreed with Petitioners' contention that the Credit Bureau was not entitled to a "qualified privilege requiring finding of actual specific intent to harm" if such a qualified privilege were based upon the First Amendment to the Constitution of the United States. On transfer to the Supreme Court of Missouri, as shown by the written Opinion (Appendix, Item No. 2), the Missouri Supreme Court, as did the Missouri Court of Appeals, ignored the Supremacy Clause of the Constitution of the United States and declined to deal with the preemption

issue. The Court reversed the decision of the Court of Appeals and, contrary to Petitioners' position, held that the Credit Bureau was entitled to a qualified privilege, notwithstanding this Court's decision in *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 86 L.Ed.2d 593, 105 S.Ct. 2939.

In each instance the issues presented for review by certiorari were timely presented to the trial court and ruled on, albeit improperly by the courts below.

ARGUMENT

Certiorari should be granted in this case and the decision of the Supreme Court of the State of Missouri should be reversed with directions to remand this case for retrial under the Instructions tendered by Petitioners.

By its grant of a "qualified privilege" to Respondent Credit Bureau the Court below has sanctioned the reckless invention and publication of false credit reports. This Court, however, has determined that it is not appropriate to enshrine commercial credit reporting with such a "privilege". The Court below has also ignored the preemptive nature of the Fair Credit Reporting Act, 15 U.S.C., Section 1681 et. seq.

A.

The Fair Credit Reporting Act has eliminated the "qualified privilege" with respect to negligent credit reporting and has provided for a "reckless disregard standard" for willful noncompliance. Prior to the adoption of the Fair Credit Reporting Act, Public Law No. 91-508, 84 Stat. 1114 (1974), the area of credit reporting was left to regulation of the states. Missouri, as with other states, applied a First Amendment based qualified privilege to credit reporting agencies thereby affording substantive protection against false, inaccurate, or misleading credit reporting. Missouri had approved such a privilege in *Estes v. Laughton-Byrne-Bruner Insurance Agency Co.*, 437 S.W.2d 685 (Mo.App. 1969); *Mitchell v. Bradstreet Co.*, 22 S.W. 358, 360 (Mo. 1983). As illustrated by the Missouri Supreme Court's Opinion below, it was necessary for the plaintiff to prove malice in fact, which is to say proof that the defendant was actuated by specific ill-will and had an actual intent to harm the plaintiff. Those First Amendment based common law principles were traditionally utilized in Missouri before 1970 and are reflected in Missouri approved Instruction No. 23.06(2), which in general follows an actual malice standard. As pointed out by the Missouri Supreme Court Committee Comment on the Instruction:

> "Paragraph Second and Third in M.A.I. 23.06(2) reflects the actual malice requirement of *New York Times* as the test was further articulated in *St. Amant v. Thompson*, 390 U.S. 727, 20 L.Ed2d 262, 88 S.Ct. 1323 (1968). The Missouri courts have applied the New York Times test on a number of accasions."

Thus, the Committee Comments to the Instruction (adopted by the Missouri Supreme Court as a part of its promulgation of the Instruction) make it clear that the Missouri courts continue to apply the *New York Times* standard to a private plaintiff's defamation action.

In 1970, the Fair Credit Reporting Act was adopted by Congress after six years of effort. One of the goals of that act was to increase accuracy in credit reports, and to that aim the act requires the agency to create, maintain, and follow procedures which are intended to insure accuracy (Section 1681(e)(b)). The Act specifically requires that the reporting agency:

> ". . . shall follow reasonable procedure to assure maximum possible accuracy of the information concerning the individual about whom the report relates." Section 1681 (e)(b).

The Act then establishes two remedies.

1. For a negligent failure to comply, there is liability for actual damage and attorney's fees (Section 1681(o)).

2. For "willful failure" to comply there is liability for actual damage, attorney's fees, and such punitive damages as the Court may allow (Section 1681(n). The Act does not define what constitutes a "willful failure to comply."

This Act, effective in 1971, also provides in Section 1681(t) as follows:

> "This subchapter does nor annul, alter, affect, or except any persons subject to the provisions of this subchapter

from complying with the laws of the state with respect to the collection, distribution, or use of any information on a consumer *except* to the extent that those laws are inconsistent with the provisions of this subchapter, and then only to the extent of the inconsistency." (emphasis added)

It is generally conceded by scholars and practitioners alike, and by the few appellate courts who have had occasion to deal with this subject that with respect to what was a common law action for defamation, the Fair Credit Reporting Act has preempted state law. See *Maurer*, "Common Law Defamation and the Fair Credit Reporting Act," 72 Ga. Law Journal, 95 (1983); *Blair and Mower*, "State Law and Common Law: The Fair Credit Reporting Act,"49 Mo. Law Review, 289 at 291 and 306.

It is clear that under the legislative intent as expressed in Section 1681(t) Congress supplanted state law tort actions, and provided a new two-faceted tort, to-wit, a negligence tort under Section 1681(o) and further provided for the recovery of punitive damages for willful violations under Section 1681(n). This preemption has been recognized in *Thornton v. Equifax, Inc.*, 619 F.2d 700 (8th Cir. 1980) and *Sunward Corp. v. Dun & Bradstreet*, 811 F.2d 511 (10th Cir. 1987).

In accordance with that preemption, Petitioners below offered in the form of Instructions B, C, and D, Instructions tailored to permit the jury to award actual damage for the negligent failure to comply with the act, and to award punitive damages under the standards established by the act. As pointed out in *Sunward Corp., supra*, at 533, it is appropriate that the *New York Times v. Sullivan*, 376 U.S. 254, 11 L.Ed.2d 686, 84 S.Ct. 710 (1964) definition of malice be applied under the act to define "willful failure." To overcome privilege under the First Amendment, the plaintiffs need only prove the credit agency acted with reckless disregard as to whether or not the report was false.

In this instance, it is absolutely clear from the testimony of the Credit Bureau emloyee alone that the McDowells were victims of a consumer report which falsely and viciously stated that they had filed bankruptcy. This was a credit report that was generated and widely promulgated without any regard to its accuracy; without the use of any procedure to check its viability and, in fact, was a credit report which was simply invented by the employee in utter disregard of the truth.

That showing alone entitled Petitioners to a negligence instruction allowing the jury to return a verdict for failure to comply with the reasonable procedures section of the Fair Credit Reporting Act, and awarding actual damage which in this case is between $512,000 and $550,000.

By ignoring the effect of the Fair Credit Reporting Act upon the laws of Missouri, the Supreme Court of the State of Missouri has utterly disregarded the supremacy clause of the Constitution of the United States. That Act, as noted in 1681(t) provides for preemption where there is an inconsistency. As illustrated by the Opinion below, Missouri does not purport to have a negligence based common law action for defamation. The common law of the State of Missouri is, therefore, by definition inconsistent with the provisions of the Fair Credit Reporting Act.

As illustrated by the Opinion below, the Missouri Supreme Court further required an actual malice standard for any recovery, including a recovery for punitive damages. Here again, this disregards the intent of Congress which was to provide a "reckless disregard" type standard for punitive damages. This Court should issue its Writ of Certiorari to correct this error and, more importantly, to provide guidance to the states as to the preemptive effect of the Fair Credit Reporting Act in order to carry out the legislative intent of the Congress of the United States, and to prevent repeated miscarriages of justice.

B.

As a further bases for the issuance of its Writ, this Court should provide guidance as to the effect of its holding in *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 86 L.Ed.2d 593, 105 S.Ct. 2939. Believing, as did the Missouri Court of Appeals for the Eastern District, that the plurality decision in *Dun & Bradstreet* determined that a private individual did not need to show "actual malice" in order to recover either actual or punitive damages where the matter reported involved: (a) a commercial speech, and (b) a credit report of only private concern, Petitioners below tendered Instructions B, C and D which were refused by the trial court. By that refusal and with its affirmation by the Supreme Court of Missouri, Petitioners believed that Missouri has inappropriately interpreted this Court's decision and have thereby granted First Amendment protection to a "commercial enterprise for hire." The facts of this case clearly illustrate the inappropriateness of extending First Amendment protection to the Credit Bureau.

The injurious conduct which damaged Petitioners manifested itself in three ways:

1. By the publication of a recklessly false credit report to Colonial Federal.

2. By the publication of that same information in a credit bulletin.

3. By failure to timely correct those errors.

The report/bulletin were clearly disseminated only to commercial subscribers, "a pay audience," of the Credit Bureau. However, it is equally clear that such information in print form was available and seen by nonsubscribers with devastating results insofar as Petitioners are concerned. As illustrated in *Dun & Bradstreet, supra*, at 762:

> "This particular interest warrants no special protection when — as in this case — the speech is wholly false and clearly damaging to the victim's business reputation."

Thus, the "speech" involved is not entitled to First Amendment protection.

This 1985 definitive decision was never reflected in the law of Missouri. That law was, by contrast, contained in Missouri Approved Instruction 23.06(1) and 23.06(2). Those Instructions promulgated by the Missouri Supreme Court contain the following comment issued in 1983, to-wit:

> "The federal decisions balancing the federal First Amendment protections of free speech and freedom of the press against the state's interest in protecting citizens from defamation have produced standards of law which are imposed upon the states by the federal constitution . . . *Gertz* also prohibits liability without a finding of actual damages. Missouri Approved Instruction M.A.I. 23.06(1), Committee Comment at Page 313.

The obvious difficulty with the burden imposed upon Petitioners by the state of Missouri is that it misinterpreted *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 41 L.Ed.2d 789, 94 S.Ct. 2997 (1974) and failed to heed at all the teachings of *Dun & Bradstreet v. Greenmoss, supra. Dun & Bradstreet v. Greenmoss* totally eliminated the necessity of "actual malice" and clearly established that there could be presumed actual and punitive damages without actual malice. Such a standard is consistent with the First Amendment in a credit report situation. Missouri Approved Instructions and the interpretation of the law by the Supreme Court simply did not "keep up."

The Instructions given patterned after 23.06(1) and (2) and M.A.I. 4.15 are simply not viable and are, in fact, constitutionaly infirm. *Hoemeke and Martineau*, "The First Amendment and Defamation," 33 St. Louis Bar Journal, 5 (1987).

Historically in Missouri, as illustrated by *Mintor v. Bradstreet Co.*, 174 Mo. 444, 73 S.W. 668 (Mo. 1903), Missouri recognized a "qaulified privilege," but couched the standard necessary to overcome that privilege as:

> "Not in good faith, but with intent to injure plaintiffs, *or* with willful and wanton neglect of the rights and interests of the plaintiff." *supra*, at 676.

That traditional standard which is consistent with the Fair Credit Reporting Act standard was, however, twisted as a result of the Court's interpretation of *New York Times*, and *Gertz, supra*. The Missouri Supreme Court, at least, took the position following *New York Times* and *Gertz*, that there must be actual malice, in fact, to overcome the privilege. See e.g. *Carter v. Willard Home Products, Inc.*, 714 S.W.2d 506, 513 (Mo. banc 1986). Thus, the Missouri Appellate Courts by the application of First Amendment standards enunciated by this Court in *New York Times* and *Gertz* took a qualified privilege which could be overcome by proof of "such recklessness or carelessness on the part of the defendant as is equivalent to an actual intent to violate the rights of others," and required the impossible burden of an "actual intent to injure."

Since this Court's holding in *Dun & Bradstreet v. Greenmoss*, it is clear that the actual malice requirement added as a result of the Missouri Court's interpretation of the First Amendment to the United States Constitution is wholly inappropriate.

Absent intervention by this Court, its decision with respect to the First Amendment are substantially at risk of misapplication, and thousands of other innocent victims of recklessly produced credit reports stand to go without compensation, absent additional guidance by this Court.

The Actual Malice Standard of *New York Times* and *Gertz* is simply not applicable and this Court should not permit the continued erroneous application of the First Amendment. To do

otherwise will create a privileged class for credit agencies in contravention to the Equal Protection Clause of the Constitution of the United States. A credit bureau which recklessly produces false credit reports which, in fact, cause injury, should not be given elevated or protected status on First Amendment grounds.

CONCLUSION

Because the Trial Court and the Missouri Supreme Court ignored the preemptive affect of the Fair Credit Reporting Act, and erroneously created a protective class of speech, to-wit, Commercial Credit Report speech for hire, this Court should issue its Writ of Certiorari and correct these errors so that the Petitioners below and thousands of victims of similar reports in the future will be able to fairly seek compensation for the devastation done to them — all in accordance with the intent of Congress and the Equal Protection Clause of the United States Constitution.

Respectfully submitted,

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& COOK PC
400 Broadway, P.O. Box 559
Cape Girardeau, MO 63701
Telephone: 314-335-8278

By _____
John L. Oliver, Jr. #20334
Attorney for Petitioners

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

DAVID McDOWELL and DONNA F. McDOWELL,

Petitioners,

v.

CREDIT BUREAUS OF SOUTHEAST MISSOURI, INC.,

Respondent.

PROOF OF MAILING — AFFIDAVIT

STATE OF MISSOURI)
)ss.
COUNTY OF CAPE GIRARDEAU)

I, John L. Oliver, Jr., attorney for Petitioners, David McDowell and Donna F. McDowell, herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ of July, 1988, I deposited in the United States Post Office located at Cape Girardeau, Missouri, with first class postage prepaid, and properly addressed to the Clerk of the Supreme Court within the time allowed for filing, the foregoing Petition for Certiorari.

_____

John L. Oliver, Jr., #20334

Subscribed and sworn to before me this ____ day of July, 1988.

_____

Notary Public
My term expires:

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

David McDowell and Donna F. McDowell,
Petitioners,

v.

Credit Bureaus of Southeast Missouri, Inc.,
Respondent.

PROOF OF SERVICE - AFFIDAVIT

STATE OF MISSOURI)
)ss.
COUNTY OF CAPE GIRARDEAU)

I, John L. Oliver, Jr., one of the attorneys David McDowell and Donna F. McDowell, petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of July, 1988, I served three copies of the foregoing Petition for Certiorari on Credit Bureaus of Southeast Missouri, Respondent herein, by delivering same to David M. Remley, Esquire, in the offices of Thomasson, Dickerson, Gilbert, and Cook, counsel of record for said Respondent, located at 715 North Clark, Cape Girardeau, Missouri 63701.

John L. Oliver, Jr., #20334

Subscribed and sworn to before me this ____ day of July, 1988.

Notary Public
My term expires:

APPENDIX

APPENDIX

CLERK OF THE SUPREME COURT
State of Missouri
Post Office Box 150
Jefferson City, Missouri
65102

Thomas F. Simon
Clerk

Telephone
(314) 751-4144

April 19, 1988

Mr. Scott E. Walter
P. O. Box 270
Jackson, MO 63755

In re: David McDowell and Donna McDowell vs. Credit Bureaus of Southeast Missouri, Inc., a corporation, No. 69559

Dear Mr. Walter:

This is to advise that the Court this day entered the following order in the above-entitled cause:

"Apps. motion for rehearing overruled."

Very truly yours,

/s/ Thomas Simon
Clerk

cc: Mr. David M. Remley
Mr. James C. Swearengen
Mr. Robert Hoemeke

CLERK OF THE SUPREME COURT
State of Missouri
Post Office Box 150
Jefferson City, Missouri
65102

March 15, 1988

Thomas F. Simon
Clerk

Telephone
(314) 751-4144

Mr. Kenneth Waldron
Mr. Scott E. Walter
P.O. Box 270
Jackson, Missouri 63755

Mr. David M. Remley
P.O. Box 1180
Cape Girardeau, Missouri 63701

Re: David McDowell, et al. vs. Credit Bureau of Southeast Missouri, Inc., No. 69559

Gentlemen:

This is to advise that the Court this day handed down the opinion attached herewith in the above-entitled cause.

Motions for rehearing must be filed within 15 days from this date (Rule 84.17). The provisions of rule 44.01)e) do not apply to extend the time for filing motions for rehearing.

Yours very truly,

THOMAS F. SIMON

/s/ Mary Elizabeth McHaney
Deputy Clerk, Court en Banc

Attachment

cc: Mr. Robert B. Hoemeke
Mr. James C. Swearengen

SUPREME COURT OF MISSOURI
EN BANC

No. 69559

David McDowell, et al.,
Appellants,

v.

Credit Bureaus of Southeast Missouri, Inc.,
a corporation,
Respondent.

APPEAL FROM THE CIRCUIT COURT OF CAPE GIRARDEAU COUNTY

Honorable A. J. Seier, Judge

Appellants appeal from a judgment entered upon a jury verdict by the Circuit Court of Cape Girardeau County in favor of respondent upon a petition which alleged that a credit report issued by respondent contained a false statement that the appellants had filed for bankruptcy.

The Court of Appeals, Eastern District, reversed the judgment but because of the importance of the issues and for the purpose of reexamining existing law and the MAI 3d instructions, transferred the cause to the Supreme Court pursuant to Mo. Const. art. V, § 10. Our review is the same as if on original appeal.

I

Appellants claimed that a credit report prepared and issued by respondent credit reporting agency to a customer was libelous because it falsely reported that appellants had filed for bankruptcy. Respondent issued the credit report to a financial institution for purposes of determining if appellants, who operated a home construction business, could convey good title

to a house. Appellants offered the following jury instructions relating to the credit report.

INSTRUCTION NO. B

Your verdict must be for plaintiffs if you believe:

First, defendant published a credit report containing the statement that plaintiffs had jointly filed bankruptcy, and

Second, such statement tended to deprive the plaintiffs of the benefit of public confidence and social associations, and

Third, such statement was read by Ken Hayden and also read and heard by other creditors, suppliers, business associates and acquaintances of plaintiffs', and

Fourth, plaintiffs' reputation was thereby damaged.

Paterned after MAI 23.06(1)
Offered by Plaintiffs
McDowell v. Credit Bureaus
Also patterned after
Dun & Bradstreet, Inc., v.
Greenmoss Builders, Inc.
53 LW 4866 (1985); ____ U.S.S.Ct. ____ (1985)
(Verdict Director)

INSTRUCTION NO. C

Your verdict must be for plaintiff if you believe:

First, defendant published a credit report and/or credit bulletins containing the statement plaintiffs were bankrupt, and

Second, Defendant was at fault in publishing such statement, and

Third, such statement tended to deprive the plaintiff of the benefit of public confidence and social associations, and

Fourth, such statement was read by members of the public, and

Fifth, Plaintiffs' reputations were thereby damaged.

INSTRUCTION NO. D

If you find the issues in favor of plaintiffs, then you must award plaintiffs such sum as you believe will fairly and justly compensate plaintiffs for any damages you believe they sustained and are reasonably certain to sustain in the future as a direct result of the publishing of the false credit report and/or false credit bulletins stating the plaintiffs had filed for bankruptcy as mentioned in the evidence.

If you find the issues in favor of plaintiffs, and if you believe that defendant published the false credit report and/or false credit bulletins with knowledge that it was false or with reckless disregard for whether it was true, then in addition to any damages to which you find plaintiffs entitled under the foregoing paragraph, you may award plaintiffs an additional amount as punitive damages in such sum as you believe will serve to punish defendant and to deter it and others from like conduct.

The trial court found that respondent was entitled to a qualified privilege. If the qualified privilege applies, the plaintiff must then prove that the statement was made "with knowledge that it was false, or with reckless disregard for whether it was true or false at a time when defendant had serious doubt as to whether it was true." MAI 23.06(2). Appellants' instructions did not conform to MAI 23.06(2) and the trial court refused instructions B, C, and D.

II

Appellants claim the trial court erred in refusing to instruct the jury on the credit report without submitting the defense of

qualified privilege. Appellants claim that current Missouri Approved Instructions incorporate federal constitutional principles which no longer apply in a libel case in which a private plaintiff sues non-media defendant regarding a matter of private concern. Appellants also argue that the qualified privilege should be abrogated because the proving of malice is too confusing and onerous.

> A communication is held to be qualifiedly privileged when it is made in good faith upon any subject-matter in which the person making the communication has an interest or in reference to which he has a duty, and to a person having a corresponding interest or duty, although it contains matter which, without such occasion and under such circumstances, although the matter communicated is defamatory and false, the law will not infer malice, but the existence thereof must be shown by some evidence beyond the falsity of the statements communicated. * * *

Estes v. Lawton-Byrne-Bruner Insurance Agency Co., 437 S.W.2d 685, 690 (Mo. App. 1969) (citations omitted). A qualified privilege has been applied to credit reporting agencies, or mercantile agencies, if the agency communication is made to a subscriber having an interest in the financial position of that business or individual. *Mitchell v. Bradstreet Co.*, 22 S.W. 358, 360 (Mo. 1893); *Minter v. Bradstreet Co.*, 73 S.W. 668 (Mo. 1903); Annotation, *Libel and the Slander Report of a Mercantile Agency as Privileged,* 30 A.L.R.2d 776 (1953); Smith, *Conditional Privilege for Mercantile Agencies,* 14 Colum. L. Rev. 187 (1914). At common law, to overcome the qualified privilege the plaintiff had to prove malice-in-fact "that is, that the defendant was actuated by ill-will in what he did and said with a design to causelessly or wantonly injure the plaintiff." M. Newell, Slander and Libel, § 277 (4th ed. 1924). In *Minter,* this Court stated that a plaintiff had to prove malice, which meant "that the report in question was prepared and published, not in good faith, but with an intent to injure plaintiffs, or with a

willful and wanton neglect of the rights and interest of the plaintiffs." *Minter*, 73 S.W. at 676, 683. Merely proving negligence does not satisfy the malice requirement because negligence does not constitute willfullness, reckless disregard of others' rights or actual presence of an improper motive to injure. *Estes*, 437 S.W.2d at 693.

The Missouri Supreme Court Committee on Jury Instructions incorporated this definition of malice in MAI 23.06 (1964) which required paragraph Fourth to be used if the qualified privilege was raised "that such statement was [written][printed]knowing it to be false] or [without knowing whether it was true or false in reckless disregard for the plaintiffs rights], and with the intent to damage the plaintiff." Current Missouri approved jury instructions require that in a libel case, if the court determines that a qualified privilege applies, MAI 23.06(2) must be used. MAI 23.06(2) instructs the jury that a plaintiff must prove that the defendant published the statement "with the knowledge that it was false, or with reckless disregard for whether it was true or false at a time when defendant had serious doubt as to whether it was true." Appellants claim this instruction incorporates federal constitutional principles that are no longer applicable in this case. Appellants rely on *Dun & Bradstreet, Inc. v. Greenmos Builders, Inc.*, 472 U.S. 749 (1985).

In *Greenmoss*, the plaintiff sued a credit reporting agency for incorrectly reporting that plaintiff filed for bankruptcy and other gross misrepresentations of financial information. *Greenmoss*, 472 U.S. at 751. The report was sent to five subscribers who were required to keep the information confidential. *Id.* Vermont law, applicable in *Greenmoss*, did not have a qualified privilege for credit reporting agencies. *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 461 A.2d 414, 419 (Vt. 1983). The trial court ordered a new trial because the instructions did not satisfy the standard set forth in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The issue before the Court was whether

Greenmoss had to prove malice to recover presumed and punitive damages when the subject matter of the communication was of a private concern. The jury found for the plaintiff and awarded presumed and punitive damages, without finding malice. *Id.* at 752. The opinion by Justice Powell stated "that permitting recovery of presumed and punitive damages in defamation cases absent a showing of 'actual malice' does not violate the First Amendment when the statements do not involve matters of public concern." *Id.* at 763. The *Greenmoss* decision does not mandate that we abrogate the qualified privilege for credit reporting agencies.

Using MAI 23.06(2) does not necessarily mean that appellants' burden of proof was based on constitutional principles. In *Snodgrass v. Headco Industries, Inc.*, 640 S.W.2d 147 (Mo. App. 1982), the court was confronted with a similar argument. The defendant in a slander suit complained that MAI 23.10(2) (an instruction similar to MAI 23.06(2)) utilized language from *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), which the defendant claimed was improper definition for actual malice. *Id.* at 154. The court noted that there was considerable confusion over the proper terminology regarding the type of malice necessary to overcome a qualified privilege, but concluded that:

> The drafters of the MAI were undoubtedly aware of the vast confusion surrounding the many terms used to describe different degrees of malice, and thus the MAI used only one term "malice", and has but one definition for the term in MAI 16.01 *i.e.* "the doing of a wrongful act intentionally without jsut cause or excuse." MAI 23.10(2) does not use the *New York Times* term "actual malice", even though it uses the Court's language defining that term. Thus, any confusion arising from the use of the term in other contexts was avoided. If this court were to adopt defendant's position, that confusion would be multipled rather than avoided. The care taken by the Supreme Court

> Committee on Jury Instructions is evident from the comprehensiveness of the instructions on libel and slander. . . .
>
> The MAI provisions are consistent, well drafted, and in line with the federal and state law concerning both qualified privilege and punitive damages.

Id. The uniform instructions were drafted to end the confusion.

This Court has continued to recognize a qualified privilege for oral statements made to a lender regarding an employee. *Carter v. Willert Home Products, Inc.*, 714 S.W.2d 506 (Mo. banc 1986). We believe that credit reporting agencies are entitled to a qualified privilege to assure that they can continue the rapid flow of credit information required by today's demanding economy.

III

Appellants next claim that if either offered instructions B or C was given, appellants would be entitled to motion for directed verdict, or in the alternative, if the qualified privilege existed, they still would have been entitled to a motion for a directed verdict. In a defamation case, Art. 1, § 8 of the Missouri Constitution prohibits a directed verdict in favor of a plaintiff. *Cf. Lupkey v. Weldon*, 419 S.W.2d 91 (Mo. banc 1967).

The trial court did not err in refusing to give tendered instructions B, C and D.

The judgment of the trial court is affirmed.

Warren D. Welliver, Judge

Billings, C.J., Blackmar,
Robertson and Higgins, JJ.,
concur; Rendlen, J., dissents;
Donnelly, J., dissents in
separate opinion filed.

SUPREME COURT OF MISSOURI
EN BANC

No. 69559

David McDowell, et al.,
Appellants,

vs.

Credit Bureaus of Southeast Missouri, Inc.,
Respondent.

DISSENTING OPINION

In *New York Times v. Sullivan*, 376 U.S. 254 (1964), the United States Supreme Court sought to constitutionalize the law of defamation in the States. It held that a public official may not recover "damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S., at 279-280.

In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) and *Associated Press v. Walker*, 388 U.S. 130 (1967), the Court extended the actual malice standard to include "public figures."

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court reaffirmed the actual malice standard for public officials and public figures but held that for private figures the States could establish their own standards of liability for defamation so long as fault is an essential element and so long as recovery of presumed or punitive damages is not permitted absent proof of actual malice.

In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 763 (1985), an opinion by Justice Powell stated "that permitting recovery of presumed and punitive damages in defamation cases absent a showing of 'actual malice' does not

violate the First Amendment when the defamatory statements do not involve matters of public concern." Rehnquist and O'Connor, JJ., concurred. Burger, C.J., and White, J., concurred in the judgment. Brennan, Marshall, Blackmun and Stevens, JJ., dissented.

In such confusing circumstance[1], I would turn to the Constitution of Missouri which provides "that every person shall be free to say, write or publish, or otherwise communicate whatever he will on any subject, being responsible for abuses of that liberty * * *." Mo. Const. art. I, § 8; *see* Mo. Const. art. XIIi, § 16 (1820).

In constructing a Missouri constitutional model, I am reminded that "freedom of speech is guaranteed to the individual and newspaper by the Constitution. Courts are charged with the duty they may not pretermit, to see to it that it is not abridged. It is, however, the use, and not the abuse of free speech and free press that is guarded by the fundamental law as sacred." *Diener v. Star-Chronicle Publishing Company*, 230 Mo. 613, 629, 132 S.W. 1143, 1148 (banc 1910).

In 1927, Justice Brandeis expressed the view that "[p]rohibition of free speech and assembly is a measure so stringent that it

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[1] Beginning in the years of Chief Justice Warren, the Court has sought, with unblinking support from academia and the media, to direct social policy in America. Its majority has forgotten that the genius of our constitutional system lies in its basic reliance on the concept of democracy and the diversity of input it provides.

The Court plays a necessary role when it protects "discrete and insular minorities." United States v. Carolene Products Co., 304 U.S. 144, 152 n. 4 (1938).

But, as with *New York Times*, other Court attempts at nationalization must invariably fail because they violate the itegrity of process implanted in our Constitution. *See* A. Bickel, *The Morality of Consent* 120-21 (1975). Such integrity of process derives, of course, from the fundamental concept that the people, not the Court, are sovereign.

would be inappropriate as the means for averting a relatively trivial harm to society." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). I agree. In similar vein, I believe that a model for the tort of defamation which *excessively* inhibits free expression by threat of penalty is a form of prior restraint on the right to communicate and is prohibited by our Constitution.

Given the intense concern for freedom of expression articulated in our Constitution, I believe that a "defendant who has abused the right of free expression by defamatory statements may be held responsible only to the extent of permitting the injured party to recover for the resulting injury to reputation—that is, to recover compensatory damages." *Wheeler v. Green*, 286 Or. 99, 593 P.2d 777, 788 (1979). I believe "that the possibility of excessive and unbridled jury verdicts, grounded on punitive assessments, may impermissibly chill the exercise of * * * [the right to speak freely] by promoting apprehensive self-censorship." *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 498, 330 N.E.2d 161, 169 (1975).[2]

Accordingly, I would hold:

First, one who publishes a false and defamatory communication concerning a public or private person or figure in regard to matters of public or private concern is subject to liability for defamation, if, but only if, he

(a) knows that the statement is false and that it defames the other person, or

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[2] *See* Anderson, *Reputation, Compensation and Proof*, 25 Wm. & Mary L. Rev. 747, 749 (1984); Van Alstyne, *First Amendment Limitations on Recovery from the Press—An Extended Comment on "The Anderson Solution,"* 25 Wm. & Mary L. Rev. 793 (1984); Franklin, *A Critique of Libel Law*, 18 U.S.F.L. Rev. 1 (1983-84).

(b) acts in reckless disregard of these matters. *See* Restatement (Second) of Torts § 580A, at 214 (1977); MA13d 23.06(2).

Second, punitive damages may not be assessed in cases involving the tort of defamation.

I respectfully dissent.

Robert T. Donnelly, Judge

IN THE CIRCUIT COURT OF
CAPE GIRARDEAU COUNTY, MISSOURI

Case No. CV684-889CC

David McDowell and Donna McDowell,
Plaintiffs,

vs.

Credit Bureaus of Southeast Missouri, Inc.,
a corporation,
Defendant.

SECOND AMENDED PETITION

COUNT I

(FCRA Violation)

Come now the plaintiffs, David McDowell and Donna McDowell, by and through their attorneys, Waldron and Walter, and for their complaint in Court I hereof state as follows:

1. This is an action for damages against defendant, Credit Bureaus of Southeast Missouri, Inc., a consumer reporting agency, brought pursuant to the Fair Credit Reporting Act, 15 U.S.C., Section 1681(p).

2. Plaintiffs are residents of Cape Giradeau County, Missouri.

3. Defendant is a corporation, incorporated in the State of Missouri, with its principal offices located in Cape Girardeau County, Missouri.

4. Plaintiffs are and have been for many years engaged in a construction business, building houses and developing subdivisions. Plaintiffs depend upon their financial and credit reputation in order to sell and build houses.

5. Plaintiffs were, on or about April 6, 1982, in the process of selling some real estate including a house thereon to a third party named Gilmore. The sale of this real estate was to be financed through Colonial Federal Savings & Loan Association in Cape Girardeau, Missouri. As a result thereof, Colonial Federal requested a credit report on David McDowell and Donna McDowell in order to proceed with the sale of the real estate.

6. That on April 6, 1982, the defendant and its employees prepared and mailed a credit report on David McDowell and Donna McDowell to Colonial Federal Savings and Loan Association.

7. On April 7, 1982, Colonial Federal Savings and Loan Association received the above mentioned credit report on David and Donna McDowell. The said report contained information showing that David McDowell and Donna McDowell had taken Bankruptcy on or about March 3, 1982.

8. That the aforementined report containing the information that David McDowell and Donna McDowell had taken Bankruptcy was totally false and inaccurate in that neither of the plaintiffs had ever taken Bankruptcy.

9. Because of the false information concerning the Bankruptcy, Colonial Federal Savings and Loan Association refused to close the loan to Gilmore which would have resulted in the sale of plaintiffs' property until such time as the credit report was corrected.

10. Thereafter, on or about April 7, 1982, Kenneth Hayden, a loan officer at Colonial Federal Savings and Loan Association, called the defendant on two occasions to have defendant investigate and/or correct their report concerning the allegation of Bankruptcy.

11. In response to loan officer, Kenneth Hayden's inquiries, the Defendant confirmed its report as factual and refused to alter the report so as to indicate that no Bankruptcy had been filed.

12. The false and inaccurate credit report remained on file and was made accessible to Defendant's customers in this inaccurate, false and uncorrected state.

13. On or about April 13, 1982, plaintiffs had their attorney at that time, John Lichtenegger, write the defendant concerning the falsity and inaccuracy of their April 6, 1982, credit report.

14. Thereafter, on or about April 15, 1982, the defendant prepared and delivered to Colonial Federal Savings & Loan Association an alleged corrected credit report removing the allegations of joint Bankruptcy as had been contained in their April 6, 1982, report.

15. Defendant was negligent in failing to follow the reasonable procedures to assure the maximum possible accurance to obtaining, maintaining and transmitting information concerning plaintiffs in defendant's file. More specifically, defendant did not follow any reasonable procedures to insure the accuracy of their April 6, 1982, report, a copy of which is attached hereto, marked Exhibit A and incorporated herein the same as though fully set out at length herein.

16. As a direct result of defendant's failure to maintain and utilize reasonable procedures to insure the accuracy of information concerning plaintiffs in defendant's file, a credit report as hereinbefore described was issued and disseminated to the public at large and selectively, and said report caused plaintiffs to suffer damage to their business and personal reputation so as to cause them loss of benefit of public confidence and business relationships; loss of credit; loss of business and to cause plaintiffs to suffer humiliation; embarrassment and mental distress and anguish.

17. Plaintiffs were required to hire and pay attorneys to represent them in this matter.

WHEREFORE, plaintiffs pray for judgment against the defendant in the sum of Five Hundred Thousand Dollars

($500,000.00), as and for actual damages, for a reasonable attorney's fee pursuant to applicable Federal Law; for their costs herein expended, and for such other and further relief as to this court shall seem just and proper.

COUNT II

(FCRA Violation - Punitive Damages)

Come now plaintiffs, David McDowell and Donna McDowell, by and through their attorneys, Waldron and Walter, and for Count II of their cause of action, state as follows:

1. Plaintiffs reallege, restate, and incorporate by reference the allegations contained in paragraphs 1 through 14, 16 and 17 of Count I of this First Amended Petition as though fully set out at length herein.

2. Defendant willfully failed to follow and/or maintain reasonable procedures to assure the maximum possible accuracy in collecting, maintaining and transmitting information concerning plaintiffs' credit worthiness in defendant's file.

3. Defendant fabricated the report of bankruptcy of David McDowell, as no person, corporation or business ever reported to the Defendant that David McDowell had filed bankruptcy.

4. Defendant did not have or willfully did not follow any reasonable procedures to insure the accuracy of their April 6, 1982, credit report concerning plaintiffs, a copy of which is attached hereto, marked Exhibit A and incorporated herein the same as though fully set out at length herein.

5. Defendants willfully failed to follow reasonable procedures to correct the inaccurate report after being notified by Colonial Federal Loan Officer, Kenneth Hayden, and allowed the report to remain inaccurate, false, and uncorrected.

6. As a result of defendant's willful failure to follow reasonable procedures to insure the accuracy of collecting, maintaining and transmitting information concerning plaintiffs' credit worthiness as maintained in defendant's file, a false and inaccurate credit report was issued and disseminated to the public at large, causing plaintiffs to suffer loss of credit, loss of business and damage to their personal and business reputations and thus a loss of benefit of public confidence; causing plaintiffs to suffer embarrassment and mental anguish and distress and causing plaintiffs to expend monies for attorney's fees in order to protect their interests.

7. That defendant's acts and/or omissions as aforesaid were willful, wanton and malicious and were done with knowledge that said information was false and with a reckless disregard for whether it was true or false at a time when defendant had serious doubt as to whether it was true, and entitle plaintiffs to punitive or exemplary damages.

WHEREFORE, plaintiffs pray for judgment against the defendant in the sum of Five Hundred Thousand Dollars ($500,000.00), as and for actual damages; for punitive damages in the sum of One Million Dollars ($1,000,000.00); for a reasonable attorney's fee pursuant to applicable Federal Law; for their costs herein expended; and for such other and further relief as to this court shall seem just and proper.

COUNT III

(Defamation - Libel)

Come now plaintiffs, by and through their attorneys, Waldron and Walter, and for Count III of their cause of action, state as follows:

1. Plaintiffs reallege, restate and incorporate by reference the allegations contained in paragraphs 1 through 14 and 16 of Count I of this First Amended Petition the same as though fully set out at length herein.

2. Defendant through its agents, servants and/or employees, published a written credit report stating that plaintiffs, David McDowell and Donna McDowell, were bankrupt and they had jointly filed for bankruptcy, which report is identified as plaintiffs' Exhibit A attached hereto.

3. Defendant was at fault in publishing such false statements in that said statement was published with reckless disregard for whether it was true or false at a time when the defendant had no basis or information from which to base the report.

4. That such written statement tended to deprive the plaintiffs of the benefit of public confidence and business and social relationships.

5. That such false statement was read by diverse individuals and became widely circulated in Cape Girardeau County and surrounding counties and areas and plaintiffs suffered humiliation, were the subject of jokes, and as a result, plaintiffs further suffered embarrassment; a loss of credit; a loss of business and mental anguish and distress as a direct result of the publishing of the false statement.

6. Plaintiffs' reputation, both personal and business reputation, was thereby damaged.

7. That defendant's acts and/or omissions as aforesaid, were willful, wanton and malicious and were done with knowledge that said information was false or with a reckless disregard for whether it was true or false at a time when defendant had serious doubts as to whether it was true and entitle plaintiffs to punitive or exemplary damages.

WHEREFORE, plaintiffs pray judgment against the defendant in the sum of Five Hundred Thousand Dollars ($500,000.00); for punitive damages in the sum of One Million Dollars ($1,000,000.00); for reasonable attorney's fees; and for their costs herein expended and such other and further relief as to the Court shall seem just and proper.

COUNT IV

(Defamation - Slander)

Come now the plaintiffs, David McDowell and Donna McDowell, by and through their attorneys, Waldron and Walter, and for Count IV of their cause of action state as follows:

1. Plaintiffs reallege, restate, and incorporate by reference the allegations contained in paragraphs 1 through 14 and 16 of Count I of this First Amended Petition the same as though fully set out at length herein.

2. Defendant, through its agents, servants and/or employees, published a false credit report stating that plaintiffs, David McDowell and Donna McDowell, were bankrupt and they had filed for bankruptcy.

3. The statement contained in the credit report stating that plaintiffs, David McDowell and Donna mcDowell, were bankrupt and that they had filed for bankruptcy, was false and said statement was published with the reckless disregard for whether it was true or false at a time when the defendant had no basis or information from which to base the report.

4. Such false statement was read, repeated and heard by diverse individuals other than plaintiff or defendant and resultantly such false statement became widely circulated in the County of Cape Girardeau, Missouri, and plaintiffs suffered humiliation, were the subject of jokes, and as a result, plaintiffs further suffered embarrassment, loss of credit, a loss of business and mental distress as a result of the statement and publication of said false statements.

5. The circulation and dissemination of the false statement throughout the community of Cape Girardeau County and surrounding counties was done without waiver by the plaintiffs or through privilege on behalf of the defendant.

6. That such false statement depicting plaintiffs as bankrupts is highly offensive to a reasonable person and is offensive to plaintiffs herein.

7. Defendant, in making and publishing the said false statement that plaintiffs were bankrupt, had knowledge of or acted in reckless disregard as to the falsity of the publicized false statement and the false light in which the plaintiffs would be placed.

8. Plaintiffs' reputation, both personal and business reputations, have been thereby damaged.

9. That defendant's acts and/or omissions as aforesaid, were willful, wanton and malicious and were done with knowledge that said information was false or with a reckless disregard for whether it was true or false at a time when defendant had serious doubt as to whether it was true and entitle plaintiffs to punitive or exemplary damages.

WHEREFORE, plaintiffs pray judgment against defendant in the sum of Five Hundred Thousand Dollars ($500,000.00); for punitive damages in the sum of One Million Dollars ($1,000,000.00); for a reasonable attorney's fee, for their costs herein expended; and for such other relief as to this court shall deem just and proper.

WALDRON AND WALTER

/s/ Kenneth L. Waldron ÷ 19385
417 N. High, P.O. Box 270
Jackson, MO 63755
(314) 243-8111

Attorneys for Plaintiffs

IN THE CIRCUIT COURT OF
CAPE GIRARDEAU COUNTY, MISSOURI

Case No. CV684-889CC

David McDowell and Donna McDowell,
Plaintiffs,

vs.

Credit Bureaus of Southeast Missouri, Inc.,
a corporation,
Defendant.

MOTION AND REQUEST DURING TRIAL

Comes now the plaintiffs by and through their undersigned attorneys and urgently move the court as follows:

1. **CLSOING ARGUMENT.** To allow counsel for the plaintiffs ample time to prepare and deliver both portions of the closing argument to the jury. As grounds therefore, plaintiffs state that:

A. The case is complex, detailed, involved many witnesses and many days of trial, and,

B. The case was adjourned for a period of three (3) full days prior to plaintiffs resting their case, and,

C. Plaintiffs' attorneys do not possess technical degrees and there are technical aspects of the case that need to be carefully dealt with and explained, and,

D. Plaintiffs' attorneys have spent countless hours on this case in the several years since April, 1982 and require a substantial amount of time in argument, to effectively represent their clients in this particular case, and to be able to be effective advocates for those clients. Much of this closing has already been prepared and condensed, but is still lengthy.

WHEREFORE, plaintiffs request, at a minimum, a reasonable time to collect their final thoughts to prepare for closing and for a *minimum* of forty-five (45) minutes to open and forty-five (45) minutes to close, for a total *minimum* time of ninety (90) minutes and that the same be extended liberally in the event of objections and court rulings.

2. **JURY INSTRUCTIONS IN ACCORDANCE WITH DUN & BRADSTREET, INC. V. GREENMOSS BUILDERS, INC.**, ____ Law Week ____, ____ U.S. ____, 1985. Plaintiffs state that this landmark case decided earlier this year by the highest court in the land, is exactly on point to the case at bar. The matter has been briefed in the Trial Brief of the plaintiffs filed in this case. The Missouri Approved Instruction (MAI) book is simply out of date for this case when, as here, we have involved a private or non-public person, for a non-public purpose and relating to that person's private person, reputation and affairs. The *Gertz* case cited in the MAI book and used to prepare certain instructions in this general area, are out of date and terribly incorrect. The effect is to place upon plaintiffs numerous burdens that are not required of them after the *Greenmoss* decision.

WHEREFORE, plaintiffs request instructions in accordance with the *Greenmoss* case and without regard to a submission by the defendant of any type of alleged qualified privilege, when the publication was *totally false* in the first instance. Simply put, this defendant never had and does not now have any type of qualified privilege to publish *totally false* statements about these plaintiffs' reputation to the audience that received same.

Respectfully submitted,

WALDRON AND WALTER

/s/ Kenneth L. Waldron #19385
417 North High, P.O. Box 270
Jackson, MO 63755
(314) 243-8111

Attorneys for Plaintiffs

The instructions tendered are set forth as follows:

INSTRUCTION NO. B

Your verdict must be for plaintiffs if you believe:

First, defendant published a credit report containing the statement that plaintiffs had jointly filed bankruptcy, and

Second, such statement tended to deprive the plaintiffs of the benefit of public confidence and social associations, and

Third, such statement was read by Ken Hayden and also heard by other creditors, suppliers, business associates and acquaintances of plaintiff's, and

Fourth, plaintiffs' reputations were thereby damaged.

INSTRUCTION NO. C

Your verdict must be for plaintiff if you believe:

First, defendant published a credit report and/or credit bulletins containing the statement plaintiffs were bankrupt, and

Second, defendant was at fault in publishing such statement, and

Third, such statement tended to deprive the plaintiff of the benefit of public confidence and social associations, and

Fourth, such statement was read by members of the public, and

Fifth, plaintiffs' reputations were thereby damaged.

INSTRUCTION NO. D

If you find that the issues in favor of plaintiffs, then you must award plaintiffs such sum as you believe will fairly and justly compensate plaintiffs for any damages you believe they sustained and are reasonably certain to sustain

in the future as a direct result of the publishing of the false credit report and/or false credit bulletins stating the plaintiffs had filed for bankruptcy as mentioned in the evidence.

If you find the issues in favor of plaintiffs, and if you believe that defendant published the false credit report and/or false credit bulletins with knowledge that it was false or with reckless disregard for whether it was true, then in addition to any damages to which you find plaintiffs entitled under the foregoing paragraph, you may award plaintiffs an additional amount as punitive damages in such sum as you believe will serve to punish defendant and to deter it and others from like conduct.

§ 1681e. Compliance procedures

(a) Every consumer reporting agency shall maintain reasonable procedures designed to avoid violations of section 1681c of this title and to limit the furnishing of consumer reports to the purposes listed under section 1681b of this title. These procedures shall require that prospective users of the information identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose. Every consumer reporting agency shall make a reasonable effort to verify the identity of a new prospective user and the uses certified by such prospective user prior to furnishing such user a consumer report. No consumer reporting agency may furnish a consumer report to any person if it has reasonable grounds for believing that the consumer report will not be used for a purpose listed in section 1681b of this title.

(b) Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.

(Pub.L. 90-321, Title VI, § 607, as added Pub.L. 91-508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1130.)

§ 1681n. Civil liability for willful noncompliance

Any consumer reporting agency or user of information which willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1) any actual damages sustained by the consumer as a result of the failure;

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(Pub.L. 90-321, Title VI, § 616, as added Pub.L. 91-508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1134.)

§ 1681o. Civil liability for negligent noncompliance

Any consumer reporting agency or user of information which is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1) any actual damages sustained by the consumer as a result of the failure;

(2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorneys fees as determined by the court.

(Pub.L. 90-321, Title VI, § 617 as added Pub.L. 91-508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1134.)

Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or

which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

ARTICLE I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

* * *

[980] MR. REMLEY: Very Well, sir. Satisfactory with the defendant.

THE COURT: Is that all right with you, Mr. Waldron?

MR. WALDRON: Yes, sir, Judge.

THE COURT: Okay. Let's go off the record and talk about the instructions.

(Discussion was had off the record, after which the following proceedings were had out of the presence and hearing of the jury:)

THE COURT: Although this is out of the usual order, we're going to discuss our instructions at this time. Is it a fair statement that all instructions numbered 1 through 7, plus the verdict forms, were submitted by plaintiff, Mr. Walter?

MR. WALTER: Yes.

THE COURT: No instructions were submitted by the defendant?

MR. REMLEY: No, Your Honor, there were not.

THE COURT: At this time, you may submit any other instructions you want to submit.

MR. REMLEY: Your Honor, may I at some pint object to the instructions?

THE COURT: Yes. Let me ask the plaintiff first what other instructions they want to submit.

MR. WALTER: We would request the Court to instruct **[981]** the jury on a burden of proof patterned after MAI 3.01.

THE COURT: That instruction will be marked Instruction A and will be refused. Do you want to give Mr. REmley a copy of that so he can have that for his file?

MR. WALTER: We will produce that for him.

MR. REMLEY: That will be fine, Your Honor.

THE COURT: This was really a modified 3.01 that you have handed to me.

MR. WALTER: It says "modified," but I don't believe it was.

THE COURT: What's your next instruction?

MR. WALTER: Your Honor, then we must address the verdict director. We would then tender 23.06(1).

THE COURT: 23.06(1)?

MR. WALTER: Right.

THE COURT: This is the one that simply talks about credit report and is in general form as the one given by the Court?

MR. WALTER: Right.

THE COURT: I'll tell you, I told you last night and I'm going to repeat for the record now, I'll give your credit report instruction, but if I do, the defendant will have a qualified privilege.

MR. WALTER: Yes.

THE COURT: I'll give you your choice.

[982] MR. WALTER: Your Honor, we would request that the Court submit the credit report instruction without qualified privilege, for we feel the qualified privilege is not applicable.

THE COURT: I have some question as to the legal status of the qualified privilege when it pertains to a private individual, in view of the Dun & Bradstreet case; but, as I told you last night, factually, I'm not sure and I don't find the qualified privilege applies particularly to the credit reports.

MR. REMLEY: You mean bulletins?

THE COURT: Correction, credit bulletins as opposed to the reports. As I read the cases, the Estes vs. Lawton-Byrne-Bruner case, and as I read Prosser and the others, I don't find that the privilege applies because I don't think — I just thought of something. Let's go off the record.

(Discussion was held off the record)

THE COURT: Factually, I simply find that the qualified privilege does not apply to the bulletins. It may apply to the report, because I'm not sure she had probable cause to believe, simply based on that last name, first name, zip code, that this was the correct Donna McDowell. And I think I have cited to you, Mr. Remley, the situation where if you represented a criminal defendant who was arrested just simply on last name, first name, you would complain and say there was no probable cause.

[983] And, in addition, if you arrested a man's sister along with him, there certainly wasn't probable cause there. I'm starting to second-guess myself, because maybe we ought to have the instruction, which you don't have and which was not offered, but the instruction that said credit reports or bulletins.

But I'll refuse your Instruction B.

MR. WALTER: Your Honor —

THE COURT: Yes?

MR. WALTER: For the record, then, we would also submit and would be willing to submit — let's mark this Instruction C, which contains the language "credit report and/or credit bulletins."

We would also wish, if the Court saw fit, to modify that to read "or credit bulletins," or "credit report and credit bulletins."

MR. REMLEY: Your Honor, if I may, Prosser clearly indicates, and that merely because there has been or is an incidental publication of a qualifiedly privileged publication does not cause that communication to lose the privilege.

Now, in this case, it was certainly privileged whtn uttered and sent to Colonial Federal Savings & Loan Association.

THE COURT: Let me stop you right there. That's where I got my problem. I understand your system, but—you and I have differences about how we view this, but, to me, just **[984]** taking, when it's so important, when it's so devastating to a man's reputation, simply taking a last name and a first name and a zip code, to me, is just not reasonable. It just doesn't give —

MR. REMLEY: Sir, are you talking about the preparation of the bulletins or the reports?

THE COURT: I'm talking about the mistake the girl made when she simply had — when all the informationshe had was a last name and a first name.

MR. REMLEY: Your Honor, if I may, the evidence that has come in as to the preparation of the bulletins is that that information never comes through the computer.

THE COURT: That's why I'm — I don't know whether we're arguing about the same thing. That's why I'm second-guessing myself and saying maybe I ought to submit to the jury the question of the credit report, because I think the preparation of the credit report, albeit to someone who has a corresponding interest as we have discussed the definition in the Estes case, I think the Estes cases says you've got to have some reasonable ground or reasonable belief, and I think that when the potential impact on a person is so great, I'm not sure that you shouldn't have to have something more than just last name, first name, zip code, particularly in a county like Cape Girardeau County where you got so many McDowells, you got so many Seabaughs, you got so many Hutsons, that sort **[985]** of thing.

MR. REMLEY: I understand that, Your Honor. Going with the fundamental premise that the communicaiton was privileged, that is the report of 4-6-82 was privileged when it got sent to Colonial Federal, that is a law question. And, as I understand it, you have determined that there is a qualified privilege for that.

If you're going to go the next step —

THE COURT: No. Originally, I said — originally, I wrote down, and you can see it on my pad up there, originally, I said I have some question about whether legally there is a qualified privilege any more, period.

MR. REMLEY: Well, I understand that, sir.

THE COURT: In view of the Supreme Court decision in that Vermont case.

MR. REMLEY: Well, Your Honor, under the law in its present state in Missouri, although it may be old law, it is still good law, that the qualified privilege is alive and kicking. And if you go that step to say that there is a qualified privilege for that credit report of 4-6-82, then you must modify the instruction and include another paragraph to that instruction in accordance with the Estes case.

THE COURT: You're correct.

MR. REMLEY: That that then becomes a question of fact.

[986] THE COURT: If, legally, there is still a qualified privilege in the State of Missouri, and if I do not find legally that it — I don't want to use a double negative. Let me just put it in the singular. If I find that it is not legally submissible, then I wouldn't have to modify it and require the plaintiffs to show malice.

MR. REMLEY: That is correct, Your Honor. And in order to do that, you've got to abandon the existing laws that exist in the State of Missouri.

THE COURT: Well, I'm not sure —

MR. REMLEY: The cases are plain that for a mercantile credit institution such as the credit bureau, as to a publication to which there is a mutual interest, both to reciepient and publisher, there is a qualified privilege. And to get away from that, you're going to have to go into the nether world on this Green-Moss and whether or not, yet, by its talking about Vermont law, where they have never had a qualified privilege, and ocme in here and sweep away Missouri law with the stroke of a pen. And I don't think the Supreme Court case meets that at all. It simply says it is not unconstitutional to only give this much protection. That is not the same thing as saying this much protection is not appropriate. And Missouri protects more than Vermont does. It lowers the minimum but doesn't change what Missouri does.

THE COURT: Scott —

[987] MR. WALTER: If I can just speak briefly, for the record, what the plaintiffs' position is, this may well go on appeal, Judge, as we have contended all along, we believe the qualified privilege is no longer applicable, either on a constitutional basis or on a common law basis, especially when you're talking about

private interest involved; and, secondly and most importantly, the means of communication, which were not even foresaw by the people who wrote Mentor and the other decisions the defendant is relying on.

Seeing that it is your decision that the qualified privilege may apply in this case, which we take disagreement, and that disagreement is noted, we would speak specifically that—

THE COURT: Well, now, I think both of you know that I'm not talking about nor do I find that the qualfied privilege applies to the bulletin situation.

MR. WALTER: Correct.

THE COURT: I think that's clearly outside the purview of the qualified privilege.

MR. WALTER: Correct. We understand that, Judge.

THE COURT: We're only arguing about the credit report aspect.

MR. WALTER: Well, but also, generally, we don't think it should enter into this discussion, but the fact is it is there because you have placed it there. We would submit **[988]** to the Court, as Mr. Remley cited Prosser, then we would cite him, too, and I quote, on Section 115, page 829, and this is just one sentence: "There is no general agreement, however, that the privilege is limited by the extent to which the particular subscriber to whom the publication is made has an apparent present interest in the report, and that insofar as there is a general publication to those without such an interest, the risk of false information is one to be borne by the business." And, therefore, since the evidence has shown that there has been publication far beyond the offices of Colonial Federal Savings, we would submit that if we submit it to the general public as we have in our verdict director that the qualified privilege would not apply, either to the credit report or to the bulletins, especial-

ly where we have had the testimony of Mr. Ellis that he saw the report in question or, Mr. Remley will recall, one like it.

THE COURT: Well, I think the discussion in the "Notes on Use" of the Committee's Comment on the applicable verdict directors also indicates there is some question about this.

For example, in 23.06(2), it says, "The Missouri courts could continue to apply this standard in such cases. However, they are probably no longer constitutionally required to do so and it would appear to be an open question as to what position the Missouri courts will take now that they are free **[989]** to determine their own position on this issue."

MR. REMLEY: That's my point precisely, sir, and that is that in that context, the fact that the Supreme Court of the United States may lower the minimum level of constitutional protection for commercial speech of this nature does not mean that everybody has to be dragged down to a lower level of protection right along with Vermont. The states are free to select the level of proof and protection and to find their own tort standard, so long as those standards are not less than the constitutional minimum.

MR. WALTER: We would submit that those Committee notes were written before the advent of the Bradstreet and Green-Moss.

MR. REMLEY: Constitutional principles don't change merely because the names of the cases change, Judge.

MR. WALDRON: I think the Court's already correctly ruled on this, and all the time you've spent on this, Judge, your analysis is correct on this. I think we ought to proceed.

THE COURT: Well, the question really is as to the report. of the bulletins, I don't think there's any question about it. I'll deny and refuse Instruction C. If we have some more time and if it's necessary, at the motion for new trial, we can certainly

correct any errors that we make. I don't want to make business for the appellate court, that's why I'm going to try to cut this as clean as I can, be as **[990]** conservative as I can and follow the instructions that the Supreme Court gives us in the approved instructions.

It is a serious question, I'll grant you, both sides. I wish I had an answer for you, but I'm going to refuse the —

What else do you have, sir?

MR. WALTER: Judge, in light of the prior discussion, to cut it short, what we have here, then, is I believe I gave you and you refused this one?

THE COURT: Yes, I've refused C, in either form, whether it says "credit report and credit bulletins" or it says "credit report or credit bulletins."

MR. WALTER: Then we have the issue of burden of proof, and we would submit first a 4.15 to coincide —

THE COURT: Right. In other words, you're saying not only wuld you submit the right verdict director but the proper supporting instructions. I will refuse the 4.15 and mark that D.

MR. WALTER: Then, also, Judge, finally, another 4.15 and accompanying definition, in light of our argument that we think the qualified privilege is completely improper regardless of the credit report or credit bulletins. We would submit that one.

THE COURT: All right. Your definition instruction for malice, malicious, and so forth will be marked E and **[991]** refused.

MR. WALTER: And this is the one where the term "malice" is —

THE COURT: What's the number on that?

THE COURT: That's another 4.15.

THE COURT: That will be marked F and be refused.

MR. REMLEY: I'm sorry; I missed that one.

MR. WALTER: We'll need a copy, Judge.

MR. REMLEY: That's another burden of proof that what?

THE COURT: It's a 4.15. That's really a damage instruction. That would go along with their theory that the qualified privilege doesn't apply to either bulletins or credit reports.

MR. WALTER: I believe that's the same one we have given. Let me just check to be absolutely certain. Well, it's patterned after our position on Green-Moss, so you can just refuse that one and mark it G.

THE COURT: G, this is a 4.15, damage instruction, after the Green-Moss case. I'll mark that G and refuse it. Anything else?

MR. WALTER: No, Your Honor.

THE COURT: All right. Nothing further for the plaintiff? Does the defendant have any further instructions they want to submit?

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